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Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

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IN THE SUPREME COURT
OF THE STATE OF MONTANA

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STATE OF MONTANA

IN RE PETITION OF THE
STATE BAR OF MONTANA
FOR REVISION OF CERTAIN MONTANA
RULES OF PROFESSIONAL CONDUCT
ADDRESSING TECHNOLOGY,
INCLUDING COMPETENCE, CONFIDENTIALITY
AND RESPECT FOR RIGHTS OF THIRD PERSONS

**PETITION IN SUPPORT OF REVISION OF THE MONTANA RULES OF
PROFESSIONAL CONDUCT PREAMBLE, TERMINOLOGY SECTION,
RULE 1.6 ON CONFIDENTIALITY AND RULE 4.4 ON RESPECT FOR
RIGHTS OF THIRD PERSONS**

COMES NOW, the State Bar of Montana Board of Trustees to respectfully
petition this Court to revise portions of the Montana Rules of Professional
Conduct, including the Preamble, Rule 1.0(p) on Terminology defining “writing,”
Rule 1.4 on Communication, Rule 1.6 on Confidentiality and Rule 4.4 on Respect
for Rights of Third Persons.

MEMORANDUM IN SUPPORT OF PETITION

1. **The Court has the exclusive authority to establish rules governing the professional conduct of attorneys.**

Article VII, section 2(3) of the 1972 Montana Constitution grants the Supreme Court the authority to make rules governing the conduct of the members of the State Bar. The Montana Supreme Court has construed this provision to give the Court “exclusive authority to promulgate such rules.” *Matter of Petitions of McCabe and Zemen*, 168 Mont. 334, 339, 544 P.2d 825, 827-28 (1975). The Court acknowledged the importance of this responsibility in *In the Matter of the Application of Kimberly A. Kradolfer v. Ed Smith*, 246 Mont. 210, 805 P.2d 1266 (1990) stating “Even before the adoption of Article VII, Section 2, Clause 3, we had held that the admission and regulation of attorneys in Montana is a matter peculiarly within the inherent power of this Court.”

The Supreme Court and State Bar of Montana have enjoyed a history of cooperation and innovation in the development and implementation of rules and programs that carry out the purposes of the organization. Those purposes are described in the Court’s Order unifying the Bar:

The purposes of the Unified Bar of Montana shall be to aid the courts in maintaining and improving the administration of justice; to foster and maintain on the part of those engaged in the practice of law high

standards of integrity, learning, competence, public service, and conduct; to safeguard proper professional interests of members of the bar; to encourage the formation, maintenance, and activities of local bar associations; to provide a forum for the discussion of and effective action concerning subjects pertaining to the practice of law, the science of jurisprudence and law reform, and relations of the bar to the public; and to insure that the responsibilities of the legal profession to the public are more effectively discharged.

Application of Montana Bar Association President, 163 Mont. 523, 518 P.2d 32 (1974).

The Montana Supreme Court reaffirmed its Constitutional duty to govern the conduct of members of the Bar in *In re the Petition of the State Bar of Montana for a Dues Increase*, 2001 MT 108, 53 P.3d 854 (2001); *In re: Revising the Montana Rules of Professional Conduct*, (Feb. 17. 2004) No.03-264; and most recently in *Cross v. VanDyke*, 2014 MT 193, 332 P.3d 215 (2014).

2. Montana's Rules of Professional Conduct require amendment to provide guidance regarding lawyers' use of technology.

Montana's Rules of Professional Conduct were last comprehensively amended in 2003. While adjustments were made to the rules in 2009 and 2010 to address the rules on advertising and limited scope representation, the advances of technology since 2003 have dramatically changed the way lawyers manage their practices as well as communicate between themselves, their clients, and the courts.

In addition, state-line barriers to practice are being eroded, and both the Uniform Bar Examination and Admission on Motion have been adopted in Montana. The explosive dynamics of modern law practice and anticipated developments in the future of the legal profession spur the current effort.

Lawyers are being challenged by the fast-paced development and increasing complexity of technology. Such dramatic changes bring potential consequences to the practitioner, the profession, and the public. According to the American Bar Association's 2015 Legal Technology Survey Report, 15 percent of law firms have experienced some form of data breach. This number represents those who know they have been breached. It is highly likely that many more firms have been breached and are unaware of the event. Security experts at legal technology events, such as the ABA TechShow and State Bar CLEs often mention that malicious actors do not need to breach the legislation-driven privacy efforts of the medical and financial industries, when they can attack the "soft underbelly" of the law firms and attorneys representing them.

The State Bar of Montana's Board of Trustees unanimously urges amendment to the Rules of Professional Conduct to address these challenges.

3. **The Proposed Amendments have been reviewed and considered by the ABA and State Bar of Montana and are ripe for consideration by this Court, after an additional comment period.**

The genesis for this Petition came in 2012 when the ABA House of Delegates approved the ABA Commission on Ethics 20/20's recommendations which amended the ABA's Model Rules of Professional Conduct and addressed confidentiality issues raised by new technologies. Specifically, the ABA amended the Terminology section on "writing," the Rules on Competence (Rule 1.1), Confidentiality (Rule 1.6), Respect for Rights of Third Persons (Rule 4.4); and the appurtenant ABA Comments (including "screening" in the Terminology section). The ABA's Report 105A detailing the revisions is included as Appendix A.

Mindful of admonitions during the 2003 rule revision effort, the Ethics Committee recognized it should not try to reinvent the wheel. The ABA's Commission spent several years preparing its Report and Montana was not in a position to duplicate its efforts. However, the proposed rules retain a distinctly "Montana flavor" as a result of discussions by the State Bar Board of Trustees and Ethics Committee. In particular, the Court will note that while the State Bar recommendations follow the ABA Model Rules for the most part, there are significant departures. For example, the Ethics Committee and Trustees continued to agree that the ABA's Comments to the Model Rules should not be adopted.

This was a practical decision in light of the resources available; it simply would take too long for the Committee, Board and Supreme Court to conduct a thorough review of the Comments, and a wrong message would be sent if the Comments were adopted piecemeal. Rather than recommend wholesale adoption of the Comments, it was agreed that they would continue to be viewed not as part of the rules, but as a guide. In one instance, concerning the ABA's Comment on Competence (Rule 1.1), the critical language was incorporated into the Montana Rules Preamble, as discussed further below.

The State Bar Ethics Committee began to review the Rules at a two-day meeting in January 2013, continued their discussion in December 2013, and reached unanimous consensus at their September 2015 meeting. In addition, the Board of Trustees dedicated their May 2015 Long Range Planning Meeting to the question: "What is the role of the Bar in responding to technological advances in the practice of law?" All the while, the Technology Committee unanimously encouraged adoption of ABA Resolution 105A as written, without amendment.

The recommendations and discussions of the Ethics Committee were prominently displayed on the State Bar website, as well as featured in several articles in the *Montana Lawyer* and in presentations made for continuing legal education purposes by Committee members and State Bar staff. Comments have

been solicited from and offered by the Technology Committee and members of the State Bar. The comments were considered both by the Ethics Committee and the Board and have helped to shape the final product.

The Board of Trustees approved the Ethics Committee's proposed amendments at its quarterly meeting in December 2015. However, in response to additional comments received following that meeting the Trustees, at their April 2016 meeting, removed a portion of the Ethics Committee's original proposal, requesting the Ethics and Technology Committees collaborate further as to the deleted proposal. The Trustees unanimously agreed, however, to submit the following proposed amendments.

4. The Proposed Amendments.

A. Terminology

Rule 1.0 is the Terminology section of Montana's Rules. The State Bar proposes Subsection (p) be amended as indicated:

(p) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, and ~~email~~ electronic communications. A "signed" writing includes the electronic equivalent of a signature, such as an electronic sound, symbol or process, which is attached to a writing and executed or adopted by a person with the intent to sign the writing.

This amendment was adopted unanimously at the Ethics Committee's first

meeting.

B. Comments, Competence and Montana's Preamble

As alluded to above, the Ethics Committee discussed adopting the ABA Comments in full, in part, or not at all. Many of the ABA's proposals in Resolution 105A are to the ABA's Comments, specifically to the Comments in the Terminology section ("Screened"), on Competence (Rule 1.1), Communication (Rule 1.4), Confidentiality (Rule 1.6), and Respect for Rights of Third Parties (Rule 4.4). While the Ethics Committee and Montana Courts frequently cite the ABA Comments as persuasive authority, the Committee agreed to not adopt the Comments as a whole, but to continue to use or reject them given the context of the Rule and the Comment in Montana.

Subject to considerable discussion was the context of Resolution 105A's Comment relating to Competence. Montana and the ABA Rule 1.1 provides:

Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Resolution 105A amended the ABA Comment to read:

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and

comply with all continuing legal education requirements to which the lawyer is subject.

Confronted with the decision to not adopt Comments, the Ethics Committee developed an elegant solution: incorporate the ABA Comment language into Montana Rules' Preamble. The Committee explained, and the Trustees agreed, inclusion in the Preamble addresses the obligation, but does not create a separate obligation which if violated could create an act subject to prosecution by the Office of Discipline Counsel. The proposed language in Montana's Preamble reads:

(5) In all professional functions a lawyer should be competent, prompt and diligent. Competence implies an obligation to keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.

The Trustees agreed that incorporating the obligation to keep abreast of the risks and benefits associated with technology in the Preamble constitutes a strong endorsement of the concept.

C. Confidentiality

ABA Resolution 105A proposes to add a new subsection to the confidentiality rule:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

The debate over this inclusion was extensive, but the decision was ultimately unanimous that this language be included in Montana's Rule 1.6 as a corresponding new subsection (c), (recognizing, of course, that Montana's Rule 1.6 is not identical to the remainder of ABA's Model Rule 1.6). At one time, it was agreed that the "shall" be converted to "should," and concern was raised about the standard of care and reasonableness. However, practical realities confronting the 21st Century practitioner prevailed. Among those realities were the fact that 17 states, predominately in the West, have adopted the Uniform Bar Examination; and that among those states, Idaho, Wyoming, Arizona, Kansas, Minnesota and Iowa have also adopted the Ethics 20/20 amendments. In addition, Oregon, Nevada and New Mexico have adopted the Ethics 20/20 amendments, though they have not adopted the UBE. So profound are the changes confronting legal practitioners that the Chair was prompted to write "The debate over the place of technology as an element of legal competence in Rules of Professional Conduct is over, but the members of the Bar do not know it yet." Reasonable effort to attain technological competence must be mandated if any lawyer using a computing device hopes to protect the confidentiality of their communications with clients. What is

reasonable will remain an issue for the Courts to determine as the 21st Century unfolds.

D. Respect for Rights of Third Persons

ABA Resolution 105A also adopted changes to Model Rule 4.4, Respect for Rights of Third Persons, and its Comment. The Ethics Committee unanimously decided in January 2013 to adopt the proposed language choices to Montana's Rule 4.4, but struggled with incorporation of ideas contained in the ABA's Comments to Rule 4.4. The Ethics Committee, after considerable discussion, developed a new subsection (c) to Montana's Rule 4.4, in addition to accepting the ABA adjustment to (b). The language of the Committee's 4.4(c)¹ is that which the Trustees removed, is not included in this Petition, and will be addressed at a later time by the Technology and Ethics Committees.

Rule 4.4 Respect for Rights of Third Persons

- (a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

¹ The proposal for 4.4(c) was: A lawyer shall not knowingly access or use electronically stored information in a communication or document received from another lawyer, for the purpose of discovering *protected* work product, privileged or other confidential information unless the receiving lawyer has obtained permission to do so from the author of the communication or document. Communication or document as used in this rule excludes documents produced in discovery and information that is the subject of criminal investigation.

- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Considerable debate attended some of the Rules recommendations.

Referenced earlier, the proposed language of Rule 1.6 on confidentiality was adopted after several thorough discussions involving both the Technology and Ethics Committees. Members of both Committees participated in each Committee's discussions. Participants in those debates have indicated they intend to file comments during the Court's ordered comment period, but agreed unanimously to submit the matter to the Court.

5. Conclusion.

The State Bar of Montana strongly believes that the amended rules are a key element in the regulation of our profession. The Board of Trustees of the State Bar of Montana and the Ethics Committee respectfully request the following relief from the Montana Supreme Court:

1. The Court direct publication of this Petition in *The Montana Lawyer* and provide for comments and a response from the public and Bar before considering the request for amendment; and
2. The Court adopt the proposed changes to the Rules of Professional Conduct.

Respectfully submitted this 13th day of May, 2016.

STATE BAR OF MONTANA

BY: 
Matthew B. Thiel, President